Saharudin bin Abd Jabar v Bank Islam Malaysia Bhd

HIGH COURT (TAIPING) — CIVIL SUIT NO S-22A-NCVC-3–02 OF 2013
MOHAMED ZAINI MAZLAN JC
28 OCTOBER 2015

Tort — Defamation — Libel — Default in repayment of Islamic loan facility — Letters of demand and statement of account published to third parties — Wrongly addressed to third parties — Plaintiff previously involved in politics — Whether elements of defamation established — Whether defamatory words referred to plaintiff — Whether words were published to third parties

The plaintiff, and the late Dato' Mohd Razlan were former customers of the defendant bank. Their relationship went south, when the plaintiff and the late Dato' Razlan defaulted with the payment of an Islamic loan facility, taken by both of them with the defendant. The defendant then commenced legal proceedings to recover the amount owing against the plaintiff, and the widow of the late Dato' Razlan. Judgment in default was subsequently entered against the widow of the late Dato' Razlan in the sessions court for the sum of RM163,179.32. The sessions court allowed the defendant's claim, but reduced the amount claimed to RM23,693.27 with interests and costs. The plaintiff had in the interim, paid in full the judgment sum to the defendant. The defendant accepted the payment conditionally. The defendant stated that payment was accepted as part payment of the total claim, and subject to the outcome of its appeal. This was not entirely peculiar, considering that the defendant's appeal in respect of the quantum at that point in time had not been heard. However, the defendant did not seem to have taken the necessary steps to get its appeal in order, which resulted in its appeal being struck out. The defendant did nothing further. Be that as it may, all was well until the year 2012, for the incidents in that year had led to this suit being filed against the defendant. In that year, the defendant issued a letter ('the first letter'). It was basically a letter of demand. The contents of the first letter stated that the defendant will appoint a named debt collection agency, should the plaintiff fail to pay RM132,631.13 within seven days from the date of the letter. The defendant followed up with another letter dated ('the second letter'). This time the letter was addressed to the plaintiff, but at a different address. The plaintiff stated his grievances with the first and second letters, and the alleged damage that had been caused to his reputation. The plaintiff demanded that the defendant cease to issue any further demand, remove his name from the blacklist, and demanded a total sum of RM10,000,000 as damages. The plaintiff also claimed that his name was on the 'blacklist', and that he had suffered losses arising from that. The plaintiff, in essence, sought damages for

negligence and defamation arising from the first and second letters, and the statement of account

Held:

(1) It was foreseeable that the plaintiff would be affected by the defendant's negligence, as it was incumbent on the defendant, to ensure that its records were accurate, before issuing the first and second letters, and the statement of account. Had the defendant done that, the plaintiff would not have been deemed as a defaulter, and that his name would not appear in the records of the defendant (see para 84).

(2) It was only fair and reasonable to impose a duty on the defendant, as its action in respect of the account, will and had in this case affected the plaintiff. Having established that the defendant owes a duty of care, and that it had breached that duty, the issue was whether the plaintiff had suffered damages arising from the breach. There was no evidence led, to prove any damages that the plaintiff had suffered arising from the negligence of the defendant issuing the first and second letters, and the statement of account. Understandably, the plaintiff would have experienced anxiety and inconvenience, but that did not amount to claimable damages. As such, there was no basis for this court to award any damages to the plaintiff (see paras 86–89).

(3) The alleged defamation claim in respect of the second letter and the statement of account was dismissed. Unlike the first letter, these two documents were not published to third parties, for they were addressed to the plaintiff at his residence. A plaintiff will need to establish the following for a claim in defamation the words were defamatory; that the words referred to the plaintiff; and the words were published to third parties (see para 123).

(4) The contents of the first letter clearly indicated that the plaintiff was in debt with the defendant. To accuse a person of having failed to pay a loan facility when due, will tend to lower him in the estimation of right thinking society, and casts an unfavourable imputation on him. It had also been established, that the cover of the first letter was addressed to the late Dato' Razlan at the Bukit Gantang branch of UMNO, and that the inner contents of the first letter referred to the plaintiff. In politics, reputation is everything. A person that is unable to manage his financial affairs could not be seen as one that could prudently serve the interests of the public or the political party that he serves. Nevertheless, the court takes cognisance of the fact that the plaintiff was no longer active in politics. The bank was also belligerent when confronted with the fact that the plaintiff had already served his dues (see paras 126–127 & 152).

[Bahasa Malaysia summary

Plaintif dan Allahyarham Dato' Mohd Razlan ialah bekas pelanggan bank defendan. Hubungan mereka musnah apabila plaintif dan Allahyarham Dato' Razlan ingkar dengan pembayaran suatu kemudahan pinjaman Islam yang diambil oleh kedua-dua mereka dengan defendan. Defendan kemudiannya memulakan prosiding undang-undang untuk mendapatkan semula jumlah yang terhutang terhadap plaintif dan balu Allahyarham Dato' Razlan. Penghakiman ingkar kemudiannya dimasukkan terhadap balu Allahyarham Dato' Razlan di mahkamah sesyen bagi jumlah sebanyak RM163,179.32. Mahkamah sesyen membenarkan tuntutan defendan, tetapi mengurangkan jumlah yang dituntut kepada RM23,693.27 dengan faedah dan kos. Plaintif secara interim, telah membayar sepenuhnya jumlah penghakiman kepada defendan. Defendan menerima pembayaran dengan bersyarat. Defendan menyatakan bahawa pembayaran tersebut diterima sebagai sebahagian bayaran daripada jumlah tuntutan tersebut dan tertakluk kepada keputusan rayuan. Ini tidak sepenuhnya pelik, memandangkan rayuan defendan berkenaan dengan kuantum pada ketika itu belum didengar. Walau bagaimanapun, defendan seolah-olah tidak mengambil langkah yang perlu untuk mendapatkan rayuan secara teratur, mengakibatkan rayuannya dibatalkan. Defendan tidak bertindak seterusnya. Dengan itu, semuanya baik sehingga tahun 2012, untuk kejadian pada tahun itu membawa kepada guaman yang difailkan terhadap defendan. Pada tahun tersebut, defendan mengeluarkan surat ('surat pertama'). Ia pada asasnya merupakan surat tuntutan. Kandungan surat pertama menyatakan bahawa defendan akan melantik seorang agensi kutipan hutang, sekiranya plaintif gagal membayar RM132,631.13 dalam masa tujuh hari daripada tarikh surat tersebut. Defendan susuli dengan satu lagi surat bertarikh ('surat kedua'). Kali ini surat itu ditujukan kepada plaintif, tetapi di alamat yang berbeza. Plaintif menyatakan rasa tidak puas hatinya dengan surat pertama dan kedua, dan kerugian yang didakwa telah terhadap reputasinya. Plaintif menuntut defendan berhenti untuk mengeluarkan mana-mana tuntutan lagi, mengeluarkan namanya daripada senarai hitam, dan menuntut jumlah sebanyak RM10,000,000 sebagai ganti rugi. Plaintif juga mendakwa bahawa namanya adalah di 'senarai hitam', dan bahawa dia telah mengalami kerugian yang timbul daripada perkara tersebut. Plaintif, pada dasarnya, menuntut ganti rugi kerana kecuaian dan fitnah yang timbul dari surat-surat pertama dan kedua dan penyata akaun.

Diputuskan, mengarahkan sewajarnya:

(1) Adalah diramalkan bahawa plaintif akan terjejas oleh kecuaian defendan, memandangkan perkara tersebut tidak boleh dielakkan defendan untuk memastikan bahawa rekod-rekodnya adalah tepat sebelum mengeluarkan surat pertama dan kedua dan penyata akaun. Sekiranya defendan melakukan sedemikian, plaintif tidak mungkin akan dianggap sebagai pengingkar dan bahawa namanya tidak akan muncul dalam

rekod defendan (lihat perenggan 84).

(2) Adalah adil dan munasabah untuk mengenakan kewajipan ke atas defendan, memandangkan tindakan berhubung dengan akaun tersebut, akan dan dalam kes ini menjejaskan plaintif. Setelah membuktikan bahawa defendan mempunyai kewajipan berjaga-jaga, dan bahawa ia telah melanggar kewajipan tersebut, isu adalah sama ada plaintif telah mengalami kerugian yang timbul daripada pelanggaran tersebut. Tiada bukti yang menunjukkan, untuk membuktikan apa-apa kerugian yang dialami plaintif yang timbul daripada kecuaian defendan mengeluarkan surat pertama dan kedua, dan penyata akaun. Difahami, plaintif akan mengalami kebimbangan dan kesulitan, tetapi itu bukanlah kepada ganti rugi yang boleh dituntut. Oleh itu, tidak ada asas untuk mahkamah ini untuk mengawardkan apa-apa ganti rugi kepada plaintif (lihat perenggan 86–89).

(3) Dakwaan fitnah seperti didakwa berkenaan dengan surat kedua dan penyata akaun ditolak. Tidak seperti surat pertama, kedua-dua dokumen tidak diterbitkan kepada pihak ketiga kerana kedua-dua dokumen tersebut ditujukan kepada plaintif di kediamannya. Plaintif perlu membuktikan yang berikut untuk satu tuntutan fitnah bahawa perkataan-perkataan tersebut berunsur fitnah; bahawa perkataan-perkataan tersebut merujuk kepada plaintif; dan perkataan tersebut telah diterbitkan kepada pihak ketiga (lihat perenggan 123).

(4) Kandungan surat pertama jelas menunjukkan bahawa plaintif berhutang dengan defendan. Untuk menuduh seseorang gagal membayar kemudahan pinjaman apabila tiba masanya, akan cenderung untuk menjatuhkannya dalam anggaran pemikiran masyarakat yang waras dan menimbulkan satu tohmahan buruk kepada beliau. Ini juga terbukti, bahawa sampul surat pertama yang ditujukan kepada Allahyarham Dato 'Razlan di cawangan Bukit Gantang UMNO, dan bahawa kandungan dalaman surat pertama merujuk kepada plaintif. Dalam politik, reputasi adalah segala-galanya. Seseorang yang tidak dapat menguruskan hal ehwal kewangan beliau tidak boleh dilihat sebagai seorang yang bijak dan boleh menjaga kepentingan orang ramai atau parti politik di mana beliau berkhidmat. Walau bagaimanapun, mahkamah mengambilkira fakta bahawa plaintif tidak lagi aktif dalam politik. Bank itu juga berkonfrontasi apabila berhadapan dengan hakikat bahawa plaintif telah menerima habuannya (lihat perenggan 126–127 & 152).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Associated Leisure Ltd and others v Associated Newspapers Ltd [1970] 2 All ER 754, CA (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)
Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561, HC (refd)
Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465, FC (refd)
David Kuok Khoon Hin v Kuok Khoon Hwong [2012] 3 MLJ 581, HC (refd)
Donoghue (or McAlister) v Stevenson [1932] AC 562, HL (refd)
Glasgow Corpn v Muir [1943] AC 448, HL (refd)
Huth v Huth [1915] 3 KB 32; [1914] H 275, CA (refd)
John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108, FC (refd)
KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd [2006] 5 MLJ 513; [2006] 4 CLJ 241, CA (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283, FC (refd)
Lee Kuan Yew v Seow Khee Leng [1989] 1 MLJ 172, HC (refd)
Lochgelly Iron and Coal Company Ltd v M'Mullan [1934] AC 1, HL (refd)
Loh Mui Fah v Dr Selvakumar Thirunavukarasu & Ors [2015] 8 MLJ 800; [2014] MLJU 574, HC (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun [1995] 2 MLJ 493, CA (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389 ; [2006] 2 CLJ 1, FC (refd)
Pullman v Water Hill & Co [1891] 1 QB 524, CA (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Sim v Stretch [1936] 2 All ER 1237, HL (refd)
Soh Chun Seng v CTOS-emr Sdn Bhd [2012] 5 MLJ 208; [[2012] 2 CLJ 886, CA (refd)
Theaker v Richardson [1962] 1 All ER 229, CA (refd)
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

Yokinee Selvam (Selvadoray Thandanyan with her) (T Selva & Co) for the plaintiff.
Ganesan Karuppannan (Subashini Ramakrishnan with him) (Ganesan & Irmohizam) for the defendant.

Mohamed Zaini Mazlan JC:

INTRODUCTION

[1] The plaintiff, and the late Dato' Mohd Razlan Haji Abdul Hamid ('the late Dato' Razlan'), were former customers of the defendant bank. Their relationship went south, when the plaintiff and the late Dato' Razlan defaulted with the payment of an Islamic loan facility, taken by both of them with the defendant. The defendant then commenced legal proceedings to recover the amount owing against the plaintiff, and the widow of the late Dato' Razlan.

[2] Judgment in default was subsequently entered against the widow of the late Dato' Razlan, in the Taiping Sessions Court on 8 November 2001. The judgment was for the sum of RM163,179.32.

[3] The plaintiff however contested the defendant's suit. The sessions court, had after a full trial, allowed the defendant's claim, but reduced the amount claimed to RM23,693.27 with interests and costs. This judgment was delivered on 12 October 2005.

[4] Clearly dissatisfied with the outcome, the defendant opted to appeal, but only in respect of the quantum. The plaintiff had in the interim, paid in full the judgment sum to the defendant. This was done through his solicitors on the 9 October 2007. The defendant through its solicitors' letter dated 17 November 2007, accepted the payment conditionally. The defendant stated that payment was accepted as part payment of the total claim, and subject to the outcome of its appeal. This was not entirely peculiar, considering that the defendant's appeal in respect of the quantum at that point in time had not been heard.

[5] However, the defendant did not seem to have taken the necessary steps to get its appeal in order, which resulted in its appeal being struck out on the 12 May 2009. The defendant did nothing further.

[6] Be that as it may, all was well until the year 2012, for the incidents in that year had led to this suit being filed against the defendant. In that year, the defendant issued a letter dated 22 March 2012 ('the first letter'). It was basically a letter of demand.

[7] The cover of the first letter was addressed to the late Dato' Razlan at No 13, Tmn Simpang Jaya, Jln Simpang, Jln Kuala Kangsar, 34700 Simpang, Taiping, Perak. However, the contents of the first letter were addressed to the

plaintiff, in his name, at an address different from the one on the cover. The address was Pusat Khidmat Wakil Rakyat, No 9, Jalan Simpang Aman 1, 34700 Simpang.

[8] In gist, the contents of the first letter stated that the defendant will appoint a named debt collection agency, should the plaintiff fail to pay RM132,631.13 within seven days from the date of the letter.

[9] The defendant followed up with another letter dated 5 July 2012 ('the second letter'). This time the letter was addressed to the plaintiff, but at a different address, which was No 9, Jalan SCI 5/6, Lakeside Villa, Sunway City, 31160 Ipoh, Perak. The contents of the second letter are similar to the first letter. Common to both letters is the defendant's statement that the letter is to be ignored, if payment had been made.

[10] The defendant had also issued a statement of account dated 30 June 2012 ('the statement of account'), to the plaintiff at No 9, Jalan SCI 5/6, Lakeside Villa, Sunway City, 31160 Ipoh, Perak. The address on the second letter and the statement of account, is apparently the plaintiff's residential address.

[11] The facts that I have stated thus far are not disputed.

[12] The plaintiff, to put it mildly, did not take kindly to the first and second letters, and the statement of account. His solicitors responded through a letter dated 24 August 2012. In that letter, the defendant was reminded of what had transpired in its suit against the plaintiff, and the fact that the plaintiff had already settled the judgment sum back in October 2007. The plaintiff also claimed that his name was on the 'blacklist', and that he had suffered losses arising from that.

[13] The plaintiff also stated his grievances with the first and second letters, and the alleged damage that had been caused to his reputation. In conclusion, the plaintiff demanded that the defendant cease to issue any further demand, remove his name from the blacklist, and demanded a total sum of RM10m as damages.

[14] The defendant, through its solicitors, responded with a letter dated 20 September 2012. The gist of its reply were as follows:

(a) that they had accepted the payment from the plaintiff in 2007 conditionally, and that they deemed that the payment made was merely part settlement of the amount owing;

(b) they had no knowledge that the defendant's appeal had been struck out,

and that they intend to file an application to reinstate the appeal;

(c) that the defendant does not intend to take the plaintiff's name off the 'blacklist', as the plaintiff had not settled the full amount owing;

(d) that the first letter was addressed to the late Dato' Razlan, as his next of kin/administrator is still responsible to settle the amount owing pursuant to the default judgment; and

(e) that the plaintiff, as joint account holders with the late Dato' Razlan, is still responsible, and should have assisted the late Dato' Razlan's next of kin to settle the amount owing, in particular, the late Dato' Razlan's portion.

[15] That was that, as the plaintiff, not satisfied with the defendant's response, filed this suit against the defendant. The plaintiff is in essence seeking damages for negligence and defamation arising from the first and second letters, and the statement of account.

[16] The trial proceeded for four days, with the plaintiff calling nine witnesses, and the defendant only one.

THE TRIAL

[17] Of the nine witnesses produced by the plaintiff, seven were subpoenaed. The nine witnesses were:

PW1	Jasamai Bin Saman (Pensioner)
PW2	Azmi Bin Sulaiman (Manager of Koperasi Mubarak Negeri Perak Bhd)
PW3	Ng Yew Theng (Manager at Public Bank Bhd)
PW4	Ismail Bin Abdul Johor (Advocate & Solicitor)
PW5	Zaleha Binti Yeop (Deposit Service Manager Bank Muamalat (M) Bhd)
PW6	Chan Yak Cheng (Customer Accounts Manager of Sunway City Ipoh)
PW7	Cheah Ngan Fun (Assistant Sales & Marketing Manager of Anjung Hijau Sdn Bhd)
PW8	Noorlina Binti Alias (Officer of Bank Muamalat (M) Bhd
PW9	The plaintiff

[18] The defendant's sole witness was Nasaruddin Zawari, it's branch manager in Taiping ('DW').

[19] Since it was not disputed that the defendant had issued the first and second letters and the statement of account, the reasons for the letters being issued would be material. As such, it would be useful to approach this suit from the defendant's perspective first.

THE DEFENDANT'S CASE

[20] In essence, this was what DW testified through his witness statement:

(a) he acknowledged the fact that judgment against the plaintiff was only for RM23,693.27 as at 12 October 2005, and that the plaintiff had settled this amount in October 2007;

(b) that the first and second letters were generated automatically by the defendant's system, when it detected an amount due;

(c) the first and second letters referred to the joint account held in the names of the defendant and the late Dato' Razlan, and that Dato' Razlan's debt, according to its records, had not been settled, hence the reason for the defendant's system generating the letters automatically;

(d) emphasised that both the first and second letters contained a statement, stating that the notice is to be ignored, if payment had already been made, and to inform the defendant within fourteen days if there were any discrepancies;

(e) that the defendant had never appointed any debt collection agency to pursue the amount claimed; and

(f) that the first letter was meant for the late Dato' Razlan, as their system still maintains the names of the original account holder, even though Dato' Razlan had passed away.

[21] DW referred to the defendant's solicitor's letter dated 20 September 2012, and clarified what being blacklisted meant. He explained that there are three circumstances where a customer could be blacklisted, namely, where his name:

(a) appears in CTOS ('Credit Tip-Off Sdn Bhd');

(b) in the internal records of a financial institution; and

(c) appears in Credit Reference Information System ('CCRIS') with Bank Negara ie the Central Bank of Malaysia.

[22] DW stated that the plaintiff's name was maintained in the defendant's defaulter's list. He went on to state that the defendant had never forwarded any information pertaining the plaintiff to CTOS. He also stated that the plaintiff's name had never been submitted to CCRIS. He also stated that, only the plaintiff could seek verification from Bank Negara, whether his name is listed in CCRIS.

[23] DW emphasised that the defendant's records did not show any request from other financial institutions, enquiring about the plaintiff's alleged debt with the defendant, and that no one, including the plaintiff, had requested for a release letter.

[24] As for the plaintiff's allegation that the first letter had been opened by a third party and therefore injuring the plaintiff's reputation, he took the view that no one, other than the person that the first letter was addressed to, should have opened the letter, and that the defendant should not be made liable for the folly of a third party.

THE PLAINTIFF'S CASE

[25] Out of the nine witnesses for the plaintiff; only one was called to give evidence pertaining to the first letter, other than the plaintiff himself, (PW1); three witnesses were officers of financial institutions, and were called to give evidence on the plaintiff's application for loans that were rejected (PW3, PW5 and PW8); three witnesses were called to give evidence on the alleged losses that the plaintiff had suffered (PW2, PW6 and PW7); and one was an advocate and solicitor for the firm that once acted for the defendant (PW4).

[26] For convenience, I will categorise the witnesses according to the purpose that they were called, and set out their testimony in turn.

PW1

[27] PW1, a pensioner is also a member of the same political organisation that the plaintiff is a member of, called 'Persatuan Pertubuhan Kebangsaan Melayu Bersatu', more popularly known in its English acronym of UMNO. PW1 holds the position of Secretary of the Veteran UMNO division of Bukit Gantang. He knows the plaintiff personally, and also of the plaintiff's standing in UMNO.

[28] The late Dato' Razlan, according to PW1, was formerly the division head of UMNO's Bukit Gantang division.

[29] PW1 stated that the address on the cover of the first letter; No 13, Taman Simpang Jaya, Jalan Simpang, Jalan Kuala Kangsar, Simpang, Taiping, Perak, is the address of the Bukit Gantang division of UMNO. The address in the letter itself (which was addressed in the plaintiff's name); No 9, Jalan Simpang Aman 1, Simpang, was the former address of UMNO's service centre of Jalan Changkat Jering, and that the centre had been closed since 1997. PW1 also claimed that the plaintiff has never had an address there.

[30] PW1 stated that he had come upon the first letter, on the counter of UMNO Bukit Gantang division's office. He claimed that the first letter had already been opened. He did not know who had opened it, and speculated that it could have been done by any of the four to five staff working there.

[31] PW1 had read the first letter. Upon reading it, he concluded that the plaintiff owed the defendant a substantial amount of money. He claimed to have been surprised that a former 'wakil rakyat' could owe so much, and wondered whether those at the helm, and the public could trust the plaintiff anymore.

[32] PW1 claimed that he had also heard from a few UMNO members saying that the plaintiff is in debt with the defendant, and was unable to pay.

PW3

[33] PW3 is the Simpang Pulai branch manager of Public Bank Berhad, and was subpoenaed by the plaintiff. He was referred to an undated letter from Public Bank Bhd to the plaintiff, which was signed by him. It was a short letter, which stated that the bank was unable to consider the plaintiff's application for a credit facility of RM1m.

[34] PW3 testified that the plaintiff had applied for a loan at the Simpang Pulai branch, and that his application, as evidenced by the bank's letter, was rejected. He explained the circumstances in which an application could be rejected, one of which is an inadequate repayment capacity, and secondly, the applicant's credit history.

[35] PW3 candidly testified that he could not recall the exact reason for the rejection of the plaintiff's application. Nevertheless, he stated that there were some adverse remarks from the results of the searches that were conducted on the plaintiff.

PW5

[36] PW5 is the deposit service manager at Bank Muamalat (M) Bhd, and

was at the material time, attached to the Wisma Maju UMNO branch. She had known the plaintiff as a customer, who had several accounts with the bank.

[37] She was asked to explain the criteria that Bank Muamalat adapts, when considering an application for a loan facility. She stated that the bank would analyse an applicant's credit standing by referring to CCRIS, and also CTOS, and that they would not approve the application, if the applicant's name appears in one of them.

[38] She was referred to Bank Muamalat's letter to the plaintiff dated 15 July 2009, where the plaintiff was informed that his application for shop office financing of RM1m was rejected. She explained the reason for the rejection. She said that it was due to the fact that the plaintiff's name had been blacklisted. However, she could not recall whether the plaintiff's name had appeared under CCRIS or CTOS.

PW8

[39] PW8 is a bank officer at Bank Muamalat, and was at the material time, the credit administrative executive at the Ipoh branch. She had described the plaintiff as a very important customer.

[40] She testified that the plaintiff's application for financing in respect of six units of condominiums at Sunway City had been rejected. She then referred to a letter from Bank Muamalat to the manager of a company called Crescent Auto Sdn Bhd ('Crescent'), dated 13 March 2009, where the bank had stated its rejection.

[41] When asked about the connection between Crescent and the plaintiff, she explained that the company belongs to the plaintiff and his son. She also confirmed that the application was made by Crescent.

[42] Like the other two bank officers that testified before her, she too explained that the bank would firstly conduct a check with CCRIS and CTOS, to ascertain an applicant's credit standing.

[43] In the plaintiff's case, she stated that the plaintiff's name had appeared in CCRIS, and that the information there suggests that he had been in default. However, she also stated that the information in CCRIS would not show, which bank that the plaintiff had been in default with. She could only tell that it was a commercial bank.

PW4

[44] PW4, another subpoenaed witness, is an advocate and solicitor, and works in the firm of solicitors that used to represent the defendant. His presence was uneventful, as it transpired that he had no personal knowledge of the defendant's suit against the plaintiff, as another colleague had handled it. His participation in the trial came to an abrupt end, when he stated that another colleague of his should have been the one taking the stand, and not him.

PW2

[45] PW2 is the manager of Koperasi Mubarak Negeri Perak Bhd ('Koperasi'). His testimony pertained to the tenancy of an apartment at a place called Greentown Suria in Ipoh. The Koperasi owns an apartment there, and had tenanted it out to another corporation for RM7,000 a month.

[46] Apparently, the purpose for PW2's testimony is to give evidence for the plaintiff's claim for damages, as the plaintiff had paid the deposit for a unit next to Koperasi's unit, the purchase of which did not materialise, as the plaintiff's application for a loan fell through.

PW6

[47] PW6 is the customer accounts manager for a property developer called Sunway City Ipoh Sdn Bhd ('Sunway'). Her testimony was in respect of the purchase of six units of apartment, by a company called Crescent from Sunway. Crescent had entered into a sale and purchase agreement in October 2008 for these six units, and had also paid deposits amounting to RM29,087 for them.

[48] According to PW6, it was the plaintiff that had represented Crescent for these transactions, and that it was him that she had dealt with. The sale however did not materialise, as Crescent could not obtain a loan. As a result, Crescent had forfeited the deposit paid, which was RM29,087.

[49] PW6 was also referred to another transaction, this time for a semi-detached 1 1/2-storey factory at Sunway City, Ipoh. However, this purchase was between Sunway, and another company called Mala Spice & Frozen Food (M) Sdn Bhd ('Mala Spice').

[50] Similar to the earlier transaction, it was also the plaintiff that she had dealt with. According to PW6, it was the plaintiff who had initially purchased the unit, but later substituted himself with Mala Spice. To her knowledge, the plaintiff's wife and children own Mala Spice.

PW7

[51] PW7 is the Assistant Sales and Marketing Manager of Anjung Hijau Sdn Bhd ('Anjung Hijau'), also a housing developer. Similar to PW6, she too gave evidence in respect of a purchase of a property, this time for a three storey shop lot at Greentown Suria, which costs RM1,666,720.

[52] The plaintiff had apparently paid RM166,672.

[53] PW7 testified that Anjung had terminated the sale and purchase agreement, and forfeited the sum of RM166,672 that had been paid by the plaintiff. This termination and forfeiture was sometime in 2012. The termination was due to the fact that the progress payment for this property was not made when due.

[54] The agreement for this transaction however, was entered between Anjung and five persons. They were the plaintiff's wife and children.

PW9 (The plaintiff)

[55] The plaintiff took the stand last. Some three pages of his witness statement were dedicated to his achievement and awards received.

[56] The plaintiff elaborated on the history of his case with the defendant leading to this suit. He then related how PW1 had given him the first letter. His version and that of PW1 were similar, including the explanation of the addresses in the first letter.

[57] He then referred to the second letter from the defendant, which is similar in contents to the first letter. However, the address on this letter was No 9, Jalan SCI 5/6, Lakeside Villa, Sunway City, 31160 Ipoh, Perak, which is different from the address in the first letter. The address in this second letter, as stated earlier, is the plaintiff's residential address.

[58] The plaintiff's testimony in his witness statement also touched on the failed purchases of the following properties:

(a) the six unit of apartments by Crescent from Sunway; which relates to PW8 and PW6's testimony;

(b) the three story shop-lot at Greentown Suria; which relates to PW2, PW5 and PW7's testimonies; and

(c) the semi-detached 1 1/2 storey factory at Sunway City Ipoh by Mala Spice from Sunway; which relates to PW6's testimony.

[59] The plaintiff claims that he invests in real estate, and claimed to have suffered losses in potential rental proceeds, or their increase in value due to the failed purchases of these three properties.

[60] He also claimed for the losses suffered by a company called Syarikat Berkat Murni Sdn Bhd. He claims that this company holds a license issued by the Ministry of Finance, and was capable of getting government contracts. He stated that he was asked to resign as a director, as the Ministry would not renew the company's license due to him being on the defendant's blacklist. The plaintiff claimed that he had played an important role in the company, and that without his presence as a director, the company was unable to procure projects from the government. The plaintiff claims that this company had ceased doing business around 2009/2010.

[61] He also related his ordeal and anguish at being blacklisted by the defendant, and the resulting blemish on his reputation for more than seven years. He claimed that this had resulted in his investments failing, and his political aspirations impaired.

ISSUES

[62] The agreed issues as drafted and agreed by both parties are:

(a) were the act of the defendant and/or its employees negligent when they sent:

(i) letter dated 22 March 2012, addressed to YB Dato' Mohd Razlan bin Hj Abdul Hamid with contents directed to the plaintiff; and

(ii) letter dated 5 July 2012 and statement of account as at 30 June 2012 to the plaintiff,

all indicative of the plaintiff being in arrears of RM132,631.13, and refusing to remove the plaintiff's name from the blacklist as maintained by Messrs Ismail AJ & Aishah's letter dated 20 September 2012, despite receiving the full judgment sum on 9 October 2007.

(b) did the act/acts of the defendant and/or its employees cause the plaintiff the following:

(i) losses as claimed; and

(ii) damage to his repute as a man of standing in society.

FINDINGS

[63] There are two aspects to the plaintiff's claim; negligence and defamation. The claim for negligence arises out of the issuance of the first and

second letters and the statement of account, and the alleged blacklisting of the plaintiff. The claim for defamation arose from the first letter. I shall address each claim in turn.

CLAIM FOR NEGLIGENCE

(a) The first and second letters and the statement of account

[64] The first facet to this claim for negligence is whether the defendant was negligent, in issuing the first and second letters, and the statement of account.

[65] For a claim in negligence to succeed, it will need to be established, that the defendant has a duty of care towards the plaintiff, that the defendant has breached this duty, and finally that the breach of this duty had caused damage to the plaintiff.

[66] The first issue therefore, is whether the defendant owed a duty of care towards the plaintiff. Whether in omission or commission, negligence must be more than needless or careless conduct, as it entails the concept of duty of care, its breach and damages arising from it; *Lochgelly Iron and Coal Company Ltd v M'Mullan* [1934] AC 1.

[67] It is a given fact, that the plaintiff has settled his part of the judgment on the 9 October 2007. It is also a given fact, that the first and second letters, and the statement of account, were issued some five years after the plaintiff has settled his part of the judgment. Although the defendant had initially appealed against the quantum of the judgment that the sessions court had awarded, that ceased to become moot, when the appeal was struck out.

[68] That being the case, the question is whether the defendant owes any further duty to the plaintiff, in a typical banker and customer relationship?

[69] In *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283, Ramly Ali J, (now FCJ), categorised the relationship between a bank and its customers into three:

(a) the traditional banking facility, where a customer maintains a current or savings account with the bank. Here the bank is a debtor, and the customer a creditor, in that the bank is required to pay when demanded by the customer of monies in the latter's account;

(b) financial advisory services, where the bank offers its advise on financial matters to its customers; and

(c) financial facilities, where the bank provides loans and overdraft facilities, in which the customer is a borrower, and the bank a lender.

[70] His Lordship concluded that the relationship is only fiduciary in the second category, and that the first and third category is a contractual relationship.

[71] In this case, the initial relationship between the plaintiff and the defendant falls under the third category. When the plaintiff and the late Dato' Razlan took up the loan facility, they were debtors, and liable to pay the defendant as a creditor for the loan taken. However, that contractual relationship ended when the debt was settled. The defendant's rights to pursue the plaintiff for payment, ended the moment that the plaintiff had paid the judgment sum in full.

[72] That begs the question of whether the defendant has a duty of care to ensure that it does not wrongly issue any letters of demand to the plaintiff. In *Kian Lup Construction*, reference was made to the dicta of Lord Macmillan in the case of *Glasgow Corpn v Muir* [1943] AC 448, where it was said:

> The duty to take care' as I essayed to formulate in *Burhill v Young* [1943] AC 92, 104 'is a duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others and may have as its reasonable and probable consequence to injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed ...The standard of foresight of the reasonable man, is in one sense, an impersonal test ... It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly the party sought to be made liable ought to have foreseen.

[73] Closer to home, is the much cited decision by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 ; [2006] 2 CLJ 1. The following passage in the judgment of Steve Shim CJ is most relevant:

> Under English law, the general duty of care test enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this tort, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[74] The basis of the plaintiff's claim is novel. I take guidance from Lord Roskill's judgment in *Caparo Industries plc v Dickman* [1990] 2 AC 605 where he remarked:

> I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a

ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exists, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definition. At best they are but labels or phrases descriptive of the very different factual situations which can exists in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

[75] The contractual relationship between the plaintiff and the defendant came to an end the minute the judgment sum was paid. Had the contractual relationship still exists, it would have been easier to conclude the basis of a duty of care between the two parties. I am of the view that although the contractual relationship had ceased to exist, the defendant has a duty of care, to ensure that its action do not harm the plaintiff, or for that matter, any party that injury may reasonably and probably be expected if the duty is not observed.

[76] That brings to the question of whether the defendant has breached its duty of care. DW's explanation was two fold: that the first and second letters were issued automatically by the bank's system, when an outstanding amount is detected in the particular account, and that since it was a joint account in the names of the plaintiff and the late Dato' Razlan, the letters had inevitably included the plaintiff's name, as the late Dato' Razlan, in their records, is still indebted to them.

[77] What the defendant should have done, is to indicate in their records, that there is no more debt outstanding in respect of the plaintiff. Even though it was a joint account, the defendant should have taken the initiative, to ensure that the plaintiff's name do not appear in any demand letters issued. It would not suffice to simply lay the blame on the system, which presumably is their computerised system, for every mechanical system, being man made, can be adjusted and corrected. There would not have been any cases of letters of demand issued to the plaintiff, had this been done.

[78] DW highlighted the fact that the defendant had never appointed any debt collection agency, as stated in the first and second letters. He also pointed out to a statement in both letters that the notice is to be ignored, if payment has already been made, and to inform the defendant within fourteen days, if there are any discrepancies.

[79] That, in my opinion, is besides the point. Any reasonable person, would feel agitated, if faced with the threat of being pursued by debt collection agencies, particularly if one has no debt to answer for. It is far easier said than

done, to ask one to ignore the notice if payment has been made, and also to notify the defendant within fourteen days for any discrepancies. It is unreasonable to impose the burden on the plaintiff, more so when he has already made payment some five years back. It is the defendant, who should have taken the initiative to correct their records.

[80] In any event, the plaintiff had through his solicitors, wrote a letter dated 24 August 2012. His solicitors had in that letter, highlighted the fact that the plaintiff had already paid the judgment sum. The response from the defendant through its solicitors, was the least to say, disappointing. Rather than taking the opportunity to mitigate the error, they chose to exacerbate matters, by asserting that the plaintiff's debt has not been fully extinguished, by virtue of the fact, that the defendant has appealed against the quantum. The defendant also claimed not to have any knowledge of the fact, that it's appeal had already been struck out in 2009 for want of action, claiming that they were not informed.

[81] The final insult, for want of a better description, was the suggestion, that the plaintiff, knowing that the late Dato' Razlan's debt is still outstanding, should take the initiative to help the latter's heir to settle the debt. This they contend, would avoid the letters being published.

[82] DW when crossed incessantly by counsel for the plaintiff, was unable to explain satisfactorily, why the first letter was issued in the name of the late Dato' Razlan on the cover of the letter, but the contents of which referred to the plaintiff. He also could not explain why the address on the cover of the first letter, differed from the address in the letter itself. He could at best, merely offered to explain, that it was the bank's system that generated the details.

[83] The basis of liability in the tort of negligence is the failure to take reasonable care; *KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd* [2006] 5 MLJ 513; [2006] 4 CLJ 241. In the *KGV*'s case, reference was also made to Lord Bridge's speech in *Caparo Industries plc v Dickman* [1990] 2 AC 605, where it was said:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it is fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[84] In my view, it was foreseeable that the plaintiff would be affected by the defendant's negligence, as it was incumbent on the defendant, to ensure that its records were accurate, before issuing the first and second letters, and the

statement of account. Had the defendant done that, the plaintiff would not have been deemed as a defaulter, and that his name would not appear in the records of the defendant.

[85] It is indeed puzzling, that the name and the address on the cover of the first letter were different from its contents. DW could not explain it. He was also not able to explain why they had used the addresses stated on the cover and contents of the first letter.

[86] In my opinion, it is only fair and reasonable to impose a duty on the defendant, as its action in respect of the account, will and had in this case affected the plaintiff. I only need to cite an extract of Lord Atkin's dicta in the celebrated case of *Donoghue (or McAlister) v Stevenson* [1932] AC 562, (HL) on the duty of care:

> Who then in law is my neighbour? The answer seems to be the person who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected whom I am directing my mind to the acts or omission which are called in question.

[87] Having established that the defendant owes a duty of care, and that it had breached that duty, the issue is whether the plaintiff had suffered damages arising from the breach. The purpose of an award of damages is to compensate the plaintiff for the losses that he has suffered. However, he bears the burden of proving the damages suffered; *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465, (FC).

[88] There was no evidence led, to prove any damages that the plaintiff had suffered arising from the negligence of the defendant issuing the first and second letters, and the statement of account. Understandably, the plaintiff would have experienced anxiety and inconvenience, but that does not amount to a claimable damages. The witnesses that were called pertained to the alleged losses that the plaintiff had suffered, pursuant to the alleged blacklisting of the plaintiff, which shall be addressed later.

[89] As such, there is no basis for this court to award any damages to the plaintiff under this particular head.

(b) The black listing

[90] The second facet is the alleged blacklisting of the plaintiff. Under para 4 of the statement of claim, the plaintiff alleged that banks, financial institutions and other credit organisations had blacklisted him. I pause to note,

A that the plaintiff had in his statement of claim, merely stated that the defendant had wrongfully caused him to be blacklisted. However, there are no particulars on the manner in which he was allegedly blacklisted. The plaintiff also did not give particulars, of the alleged blacklisting in this witness statement. The plaintiff seemed to have relied heavily on the defendant's solicitors' letter to his B solicitors dated 20 September 2012, where it was stated that the plaintiff's request to have his name taken out from the blacklist could not be entertained, as the true judgment sum had still not been settled.

C **[91]** DW in referring to the letter dated 20 September 2012 issued by the defendant's solicitors, had clarified what being blacklisted means. He went on to state that the defendant had never forwarded any information pertaining to the plaintiff to CTOS.

D **[92]** It is now common knowledge on what CTOS does. In the case of *Soh Chun Seng v CTOS-emr Sdn Bhd* [2012] 5 MLJ 208; [[2012] 2 CLJ 886 , the workings of CTOS were explained in great detail. Briefly, CTOS is a fee-based service that provides a credit search report on individuals and corporations. The information is derived from a database containing information collated E and compiled from public records such as government *gazette*s, newspapers and data from the registry of business and the Companies Commission of Malaysia. Financial institutions and law firms commonly use it. However, it is also well known that the information in CTOS comes with a disclaimer that advises the user to make further inquiries, and that the information contained F is not to be relied as a confirmation of the status.

[93] The question now is whether the plaintiff was listed in CTOS, and if so, whether it was at the behest of the defendant. DW referred to two CTOS reports, one dated 18 August 2006, and the other dated 22 August 2014. The G plaintiff's name did not appear in both reports, lending weight to the defendant's contention that they had never submitted the plaintiff's name to CTOS. Furthermore, the plaintiff did not produce any evidence that his name had been published in CTOS. In any event, the plaintiff had during cross-examination, agreed that his name had never appeared in CTOS.

H

[94] As to whether the defendant had blacklisted the plaintiff in it's internal records, it transpired during DW's cross-examination that the defendant's records, had until 22 August 2014, show that the plaintiff is indebted to the defendant in the sum of RM132,000. DW explained that the plaintiff's name I had appeared as still being in debt, as the account was a joint account, and that the plaintiff's name could not be segregated. Since the late Dato' Razlan's portion had not been settled, the joint account will show that there is still a debt outstanding. On this basis, it can be concluded that the plaintiff's name had appeared as a defaulter in the defendant's records, at least until 22 August 2014.

[95] Nevertheless, there was no evidence adduced to show that the plaintiff's name had appeared in any other financial institution's blacklist.

[96] As for CCRIS, DW had stated in his witness statement that the defendant had never submitted the plaintiff's name to CCRIS. He also stated that only the plaintiff could seek verification from Bank Negara whether his name is listed in CCRIS.

[97] DW in his witness statement stated that the plaintiff's name had never appeared in CCRIS. However, under cross-examination, it was revealed that the plaintiff's name would appear in Bank Negara's CCRIS as a defaulter. This was what transpired in cross-examination:

164 S: Yes. Dan data hutang atau jumlah yang tertunggak will remain until it is updated. Setuju?

J: Setuju.

165 S: So Bank Negara would have that informasi, that information sehingga pihak bank akan update the system in Bank Negara.

J: Ya.

166 S: Yes ya. Now mengikut D5, dan keterangan En. Nasaruddin pada pagi ini, setuju atau tidak sehingga Ogos atau selewat-lewat 2014, sehingga pihak Bank Islam telah membuat keputusan muktamad untuk write off 132 ribu tersebut, maklumat bahawa.. I'm only khusus to Dato' Saharuddin, OK Dato' Mazlan dan Dato' Saharuddin nama kedua-dua mereka dicaptured di Bank Islam, sorry di Bank Negara sebagai berhutang 132 ribu. Sehingga the date of write off. Setuju?

J: Setuju.

[98] SP8, the officer from Bank Muamalat (M) Bhd had in her testimony, also confirmed that the plaintiff's name had appeared in CCRIS, when she checked sometime in March 2009. This was what SP8 testified during examination-in-chief:

PP: Puan, boleh puan maklumkan apakah default payment di CCRIS report yang puan telah memantau untuk membolehkan puan reject permohonan?

SP8: Somewhere Mac 2009, kita track record of the customer dan dapati ada default payment. That's why Bank Muamalat tidak dapat meluluskan. Based on CCRIS record.

PP: Puan, boleh maklumkan apa yang puan melihat dalam system tersebut?

SP8: Ada default payment dalam itu yang fall back kepada ... ahh ... daripada sini untuk makluman ahh ... once customer masuk Mac 2009 untuk masuk financing kita akan check CCRIS record dan CTOS. CTOS clean. CCRIS record ada default payment. Default payment ini sama macam CCRIS record yang ada pada rekod kami 2007.

[99] SP8 went further to state that the entry date in CCRIS was 19 May 2007 pertaining to the default. This tallies with the date of the facility agreement between the plaintiff and the late Dato' Razlan with the defendant, which was 15 May 1997. SP8 had explained that the date in CCRIS would be the date the financing started.

[100] However, under cross-examination, SP8 agreed that she was not certain that it was the defendant's banking facility with the plaintiff that was reflected in CCRIS:

PD: Tadi, puan diminta untuk rujuk kepada gadaian dengan asset purchase, Sale & Purchase Agreement berkaitan dengan bank Islam dengan Dato Saharudin dengan seorang lagi ya?

SP8: Ya

PD: Supaya mereka dapat hubung kaitkan jumlah kemudahan dengan jumlah harga jualan dengan jumlah ansuran dengan maklumat yang konon puan bertubi-tubi dirujuk kepada semua dokumen ini, bolehkah puan mengesahkan bahawa inilah kemudahan yang tercatit dalam CCRIS?

SP8: Tidak.

[101] SP8 had also testified that CCRIS would not show which bank had submitted the information contained in there, and that only the customer concerned can seek the information from Bank Negara. DW also stated this fact. The plaintiff could have easily determined his status in CCRIS had he had gone to Bank Negara to check. He admitted this in cross-examination, and merely said that he was not advised to do so.

[102] CCRIS is a computerised database system maintained by Bank Negara, and contains credit information of borrowers in Malaysia. It receives credit data from financial institutions, as the latter are required to send monthly reports of all their borrowers. The credit data would include among others, information on the loan amount and the status of the loan repayment of borrowers. In gist, one would be able see the credit performance of a borrower, as CCRIS would reveal whether the borrower concerned had been diligent in paying or in default.

[103] I find that it is more probable than not, that the plaintiff's information in CCRIS was in respect of his facility with the defendant, and his alleged default. DW's answer in cross-examination and SP8's testimony as highlighted before supports this. Furthermore, it has been established through DW, that the defendant had only written off the plaintiff's alleged debt in August 2014. The evidence, such as the defendant's solicitor's letter, and the first and second letters, evince the fact that the defendant had deemed the plaintiff to still be in debt to them, although this was factually and legally incorrect.

[104] The pertinent question now, is whether the plaintiff had suffered any damages arising from this name being listed as a defaulter in the defendant's internal records, and CCRIS. As highlighted earlier, the plaintiff produced witnesses relating to the alleged damages that he had suffered. It is trite that there must be a casual link between the negligence and the damages suffered, and that the damages were not too remote from the causative act.

[105] I will firstly dismiss the plaintiff's claim for damages in respect of Syarikat Berkat Murni Sdn Bhd, arising from his resignation as a director. He had resigned on the 1 March 2004, and this was prior to the judgment entered against the plaintiff in the sessions court, which was on 12 October 2005. There is quite simply no casual link. In any event, there was no evidence led to prove any damages that this company had allegedly suffered.

[106] The plaintiff testified that he invests in real estate properties, and that he had suffered losses due to being blacklisted. The plaintiff's focus on the alleged damages that he had suffered pertained to these following properties:

(a) three storey shop lot at Greentown Suria;

(b) six units of condominium at Sunway City; and

(c) semi-detached 1 1/2 storey factory at Sunway City.

I shall approach each property and relate the relevant testimonies by the plaintiff's witnesses.

THREE STOREY SHOP LOT AT GREENTOWN SURIA

[107] The witnesses that testified in respect of this property were PW2 (the Manager of Koperasi Mubarak Negeri Perak), PW3 (Branch Manager of Public Bank), PW5 (Deposit Service Manager of Bank Muamalat), and PW7 (Assistant Sales and Marketing Manager of Anjung Hijau), the developer.

[108] PW2's testimony relates to the unit next to the one that the plaintiff had proposed to purchase, and had in particular gave evidence on the rental proceeds that Koperasi had obtained from its own unit. The purpose was to

show the rental proceeds that the plaintiff could have earned, had the purchase been successful. The plaintiff claimed that he could have rented out the property, as he had already secured Bank Muamalat as a tenant for a monthly rental of RM12,000.

[109] The plaintiff in his witness statement stated that the developer, Anjung Hijau, had forfeited the sum of RM166,672 that he had paid as part-payment towards the purchase of this property. This he claimed was due to his inability to obtain a loan from Bank Muamalat and Public Bank, to pay for the remaining amount due. PW3 and PW5 had respectively testified that Public Bank and Bank Muamalat had rejected the plaintiff's loan application of RM1m in 2009.

[110] Obviously, the testimonies of PW5, PW2 and PW7 were to support his claim for special damages, and for the loss of the forfeited sum.

[111] At first blush, it would seem that the rejection of the plaintiff's loan application with Public Bank and Bank Muamalat had led to his inability to finance the purchase of this property. However, it was apparent from PW7's testimony and the sale and purchase agreement, that the purchase was between Anjung and five other individuals. These five individuals were the plaintiff's wife and children.

[112] I am therefore inclined to agree with the defendant's counsel's proposition, that the plaintiff's claim for damages must fail. The plaintiff is clearly not the beneficial owner of this property. Even if it was to be assumed for a moment that this property was purchased for his benefit, and that he had used his wife's and children's name as purchasers, there was no evidence led to suggest this.

[113] I have taken note of the fact that the plaintiff applied a loan for himself with Public Bank and Bank Muamalat. However, there was no evidence put forward to relate his loan applications to this property. In what capacity did the plaintiff apply for the loan, when the purchase of this property was in the name of his wife and children?

[114] The plaintiff's claim for damages in respect of this property is as such untenable. Quite simply put, he was not the purchaser.

[115] To drive home this point, the plaintiff's solicitors, when writing to Anjung Hijau to seek for the return of the plaintiff's payment, stated in all their correspondences that they act for these five persons, and not the plaintiff.

[116] Although these banks may have rejected the plaintiff's application for a loan due to him being listed as a defaulter in CCRIS, there is no legal or contractual nexus between him and his family members, who were legally the purchasers of the property. Any losses arising from the purchase of this property were that of these five persons, and not that of the plaintiff.

SIX UNITS OF CONDOMINIUM AT SUNWAY CITY

[117] The relevant witnesses for this particular property were PW8 (Bank Officer of Bank Muamalat), and PW6 (customer accounts manager for Sunway).

[118] As stated earlier, PW6's testimony was in relation to the plaintiff's deposit amounting to RM29,087 being forfeited, due to the fact that further progress payments were not made when due. This relates with PW8's testimony of the plaintiff's loan application that was rejected. The situation here is similar to the plaintiff's failed purchase of the three storey shop lot at Greentown Suria.

[119] Similar to the failed purchase of the three-storey shop lot at Greentown Suria, the plaintiff's claim for damages for this property too is untenable, as he was not the purchaser for this property. The purchase of this property, as testified by PW6 and evidenced from the sale and purchase agreement, was between Crescent and Sunway. Crescent and not the plaintiff suffered the losses.

SEMI-DETACHED 11/2 STOREY FACTORY AT SUNWAY CITY

[120] The witness that testified for the plaintiff in respect of this property was also PW6. Similar to the earlier transaction, it was also the plaintiff that she had dealt with. According to PW6, it was the plaintiff who had initially purchased the unit, but later substituted himself as a purchaser with Mala Spice.

[121] Unlike the two other properties, there were no witnesses called to show a link between a loan application rejected and the purchase. Nevertheless, my finding on this property is on the same footing as to that on the two other properties. In this case, the one that had suffered form the termination was Mala Spice, not the plaintiff.

A DEFAMATION

[122] I now come to the plaintiff's claim for defamation. There were three acts committed by the defendant, which raises the claim for defamation by the plaintiff, namely, the publication of the first and second letters, and the statement of account.

[123] I will firstly dismiss the alleged defamation claim in respect of the second letter and the statement of account. Unlike the first letter, these two documents were not published to third parties, for they were addressed to the plaintiff at his residence. A plaintiff will need to establish the following for a claim in defamation:

(a) the words were defamatory;

(b) that the words referred to the plaintiff; and

(c) the words were published to third parties.

[124] The first issue is whether the contents of the first letter were defamatory.

[125] Words that tend to lower the plaintiff in the estimation of right-thinking members of society are deemed to be defamatory; per Lord Atkins in *Sim v Stretch* [1936] 2 All ER 1237. In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 Gopal Sri Ram JCA (as he then was) held that the test is whether the words in their natural and ordinary meaning, will impute the plaintiff of any dishonorable conduct or a lack of integrity on his part.

[126] The contents of the first letter clearly indicated that the plaintiff was in debt with the defendant. In my opinion, to accuse a person of having failed to pay a loan facility when due, will tend to lower him in the estimation of right thinking society, and casts an unfavourable imputation on him.

[127] It has also been established, that the cover of the first letter was addressed to the late Dato' Razlan at the Bukit Gantang branch of UMNO, and that the inner contents of the first letter referred to the plaintiff.

[128] I accept the evidence by PW1 that he had come across the first letter in an opened state on a counter there, and that he had read it, as this fact was not challenged. In view of the fact that the premises was UMNO's Bukit Gantang branch office, it can be safely deduced, that the contents of the first letter would have been published to others, such as the staff working there or others.

[129] The germane issue is whether the defendant can be faulted for the publication of the first letter. The defendant took the view that no one other than the person that the first letter was addressed to should have opened the first letter, and that the defendant should not be made liable for the folly of a third party.

[130] The defendant sought to rely on the English case of *Huth v Huth* [1915] 3 KB 32; [1914] H 275. In that case, the butler had out of curiosity, opened a letter addressed to his employer. The Court of Appeal held that the butler's curiosity could not make the defendant liable for the publication of the letter.

[131] In this case however, the letter was addressed to the late Dato' Razlan, who was formerly a member of the UMNO branch there. It would not be out of the ordinary for the staff there to open the first letter, in view of the fact that the late Dato' Razlan was a former member. It would be safe to deduce that the staff working there would have assumed that the first letter could be related to party matters, as it was addressed to the UMNO branch office. The plaintiff could have been avail of a defence, if the letter had been marked as 'Private & Confidential' or 'To be opened by the addressee only'; see *Huth v Huth*.

[132] In *Theaker v Richardson* [1962] 1 All ER 229, it was held that there is no presumption that an unsealed or sealed letter will be read by third parties, unless it is reasonable to expect that the letter concerned, will in the ordinary course of events, be opened by third parties. The issue here is whether it is a natural and probable cause that a letter addressed to a deceased, and sent to the branch political office where the deceased used to be a member, would be opened and read?

[133] It is my view that it would be perfectly reasonable, to presume that a letter addressed to an UMNO office would most likely be opened and read by the staff. Other than the staff that works there, a political organisation's office will normally attract scores of visitors.

[134] There have been decided cases, where the courts have held that it is expected that letters addressed to offices would be opened by the staff; *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315, *Pullman v Water Hill & Co* [1891] 1 QB 524.

[135] The defendant also highlighted that no other names were given to prove that the first letter was read save for PW1. I will also presume that others too will read an opened letter for the reasons that I have mentioned earlier. Based on the inference that the first letter would have been published to third parties, there is no necessity to prove that the first letter had been read by third parties;

see *Theaker v Richardson* and *David Kuok Khoon Hin v Kuok Khoon Hwong* [2012] 3 MLJ 581.

[136] In any event, it is sufficient for the plaintiff to prove that the first letter had been read by PW1. The extent of the publication is only a factor to be considered in the award of damages, as the wider the publication, the higher the damages.

[137] The defendant has pleaded the defence of qualified privilege, justification and fair comment. I will now address the defences pleaded by the defendant in turn.

QUALIFIED PRIVILEGE

[138] For the defendant to avail the defence of qualified privilege, it must be proven that it had a legal, social or moral right to do the act complained of; *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108, (FC) and *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561 (HC).

[139] This right however, must be based upon an existing duty on the part of the defendant, and that the plaintiff too had a corresponding duty to receive it. The defendant's bona fide belief of an existence of the duty is immaterial; *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b.

[140] As established earlier, the plaintiff has fully settled his debt with the defendant. This are no longer bound contractually. That being the case, I see no reason to hold that the defendant has a legal right or duty to issue the first letter to the plaintiff. I am also of the view, that the defendant has no social or moral rights to issue the first letter to the plaintiff, for there are no circumstances that would justify that, as their relationship was that of a bank and its former client.

JUSTIFICATION

[141] For the defence of justification to succeed, the defendant must be able to prove the truth of the alleged defamatory words complained of. The defence of justification in this country, does not follow that of the common law, and is specifically set out under s 8 of the Defamation Act 1957. Under the common law, the defendant would need to substantially justify the alleged defamatory words. By virtue of s 8 of the Act, the defendant's defence of justification will succeed, even if the truth of every single charge is not established. The proviso however, is that the words which could not be justified, have not materially injure the plaintiff's reputation.

[142] The defendant's justification of the contents of the first letter is similar to the defences that it had raised in defending the claim of negligence. The defendant contend that the plaintiff's payment was treated as part payment towards the amount owing in the joint account of the plaintiff and the late Dato' Razlan, and that it was justifiable for it to issue the first letter. To the defendant, there is still an amount owing.

[143] My view here would mirror the same findings that I had arrived at in respect of the negligence claim. There is simply no basis for the defendant to issue the first letter to the plaintiff. The payment by the plaintiff had totally exonerated his debt. To succeed in a defence of justification, the defendant must be able to prove the truth of the allegations, and that a mere believe that the allegations were truthful is insufficient; *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173.

[144] For this reasons, the defendant's defence of justification must fail.

FAIR COMMENT

[145] Richard Malanjum J (now CJSS), in *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, set out the following basic elements that a defendant must establish in order to succeed in a defence of fair comment:

(a) that the words complained of are comments, though they may consist of or include inference of facts;

(b) that the comments are on a matter of public interest; and

(c) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved.

[146] Firstly, the contents of the first letter are not what one would perceive as comments. They were statement of facts. The defendant in essence alleged that the plaintiff owes it money. Secondly, even if the words were taken to be as comments, they were not based on facts that are true, as the plaintiff does not owe the defendant any money at the time that the first letter was issued.

[147] I would therefore conclude that the defendant's defence of fair comment fails.

CONCLUSION

[148] Having dismissed all the defences raised by the defendant, I now come to the award of damages. It was held by the Court of Appeal in *MGG Pillai v*

Tan Sri Dato Vincent Tan Chee Yioun [1995] 2 MLJ 493, that libel, is a tort actionable per se, without the need to proof actual harm, and that the law presumes that when a man's reputation is assailed, some damage will flow from it. The Court of Appeal went on to state some useful guidelines in determining the quantum of damages that the court may award. I will set out succinctly the relevant guidelines that are applicable to this case:

(a) the profession or standing of the plaintiff in society is a relevant factor, and that the higher the reputation, then the higher the damages,

(b) when the defence of justification fails, the damages multiply; per Lord Denning in *Associated Leisure Ltd and others v Associated Newspapers Ltd* [1970] 2 All ER 754,

(c) the more the libelous it is, the higher the damages.

[149] The plaintiff in his witness statement, had also list out his numerous positions from the past to present, the most notable being his appointment as the State Assemblyman for Trong, Perak, for two terms, from 1995 to 2003. He is currently the Chairman of the Council of ex-State Assemblymen of Perak. He has also been awarded the 'Darjah Dato Paduka Mahkota Perak' in 2003, which entitles him to carry the honourable title of Dato'. I would conclude that the plaintiff is a man of standing in society. This is a proud man who sees himself as having served the public, and has gained a respectable position in the eyes of his political party, and in the eyes of the public.

[150] Damages in defamation are meant to be compensatory; see *Lee Kuan Yew v Seow Khee Leng* [1989] 1 MLJ 172. It should never be viewed as a lottery for a plaintiff to profit from. I am aware that there are no set formulas for the court to refer to when awarding damages, save for taking guidance from the trend of damages that have been awarded. There was a period, where the damages awarded in defamation suits were staggering. This period has ended.

[151] The amount to be awarded would depend on the facts and circumstances of each case. In this case, the plaintiff's reputation was tainted with allegation of him being allegedly in debt to the defendant, a bank. However, the publication was limited to members of his constituent, in particular the UMNO members. It was not published nationwide, nor were there any evidence to suggest that publication had gone beyond his locality.

[152] I will however take cognisance that in politics, reputation is everything. A person that is unable to manage his financial affairs could not be seen as one that could prudently serve the interests of the public or the political party that he serves. Nevertheless, I take cognisance of the fact that the plaintiff was no longer active in politics. I also take note of the fact that the bank was belligerent when confronted with the fact that the plaintiff had already served his dues.

[153] The failure of the defendant's defence of justification must also be taken into consideration, for when a defendant fails to justify, the damages multiply. Lord Denning in *Associated Leisure Ltd v Associated Newspapers* had this to say:

> The defendants, in putting this plea of justification on the record, run a very grave risk. If it fails, the damages, which might otherwise have been modest, would now be colossal.

[154] From the time that the defendant's solicitors responded through their letter to the plaintiff's solicitors until this trial, there were no attempts by the defendant to make amends. On the contrary, they remain adamant that their actions were justified. All that the defendant needed to do was to rectify its records, and pacify the plaintiff. After all, the plaintiff had made attempts to point out the defendant's errors.

[155] I had the fortune of reading the judgment in *Loh Mui Fah v Dr Selvakumar Thirunavukarasu & Ors* [2015] 8 MLJ 800; [2014] MLJU 574, where counsel for the plaintiff had set out a list of awards that the court had recently awarded in defamation cases. Following the current trend of awards, the plaintiff is awarded the sum of RM50,000 as damages for defamation, with interests of 5%pa from the date of judgment until full settlement, and costs of RM30,000.

Order accordingly.

Reported by Afiq Mohamad Noor